

*Distributed to ICRC on July 11. Dixon advised
the Attorney General agrees. P.H.*

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Interagency Classification Review Committee

The Central Intelligence Agency has requested our concurrence in its view that the Interagency Classification Review Committee (ICRC) does not or, in the alternative, should not have jurisdiction to determine whether CIA documents containing references to intelligence sources and methods are properly classified. We have been asked to express our view on the matter at the next meeting of the Committee on July 11. I believe the matter is of enough significance to warrant your attention.

The question presented involves an interpretation of Executive Order 11652 which substantially revised the classification system and established an Interagency Classification Review Committee to monitor the administration of the Order and to act on appeals from departmental or agency denials of requests to declassify documents. Section 7(C) of the Executive Order, a copy of which is attached, provides that the Attorney General shall personally or through authorized representatives of the Department of Justice render an interpretation of the Order with respect to any question arising in the course of its administration.

The Central Intelligence Agency has advanced two arguments in support of its view that questions regarding the declassification of CIA documents containing references to intelligence sources and methods are or should be outside the jurisdiction of ICRC. Its draft letter embodying the arguments is attached. Our comments on CIA's positions follow seriatim:

1. CIA contends that ICRC cannot assert jurisdiction to determine whether CIA documents containing intelligence

sources and methods information should remain classified because 50 U.S.C. 403(d) vests responsibility in the Director of the CIA to "protect . . . intelligence sources and methods from unauthorized disclosure." In essence the argument is that jurisdiction cannot extend to such documents because the assertion of jurisdiction by another agency would be in derogation of the statutory responsibility vested in the Director of the CIA.

The preface to 403(d), however, provides that in performing the assigned duties the CIA is subject to the direction of the National Security Council (NSC). Because ICRC is an arm of NSC in monitoring the administration of E.O. 11652, (Section 7(A) of the Order provides that ICRC is established "[t]o assist the National Security Council" in monitoring the implementation of the Order), the responsibility of the Director in protecting intelligence sources and methods is also subject to the supervision of ICRC. Thus, an assertion of jurisdiction by ICRC is not in derogation of the responsibility vested in the Director of the CIA because that responsibility is not exclusive. Accordingly, 50 U.S.C. 403(d) does not, in our view, exempt CIA documents involving intelligence sources and methods from the jurisdiction of ICRC.

2. The CIA argues, in the alternative, that even if Section 403(d) does not exempt these CIA documents from ICRC jurisdiction, the Committee should draft its procedures to preclude such jurisdiction.

This argument raises two issues, one legal, one policy: (a) whether under the current Executive Order ICRC can legally exempt CIA documents containing intelligence sources and methods information from its review; and (b), if the answer to (a) is in the affirmative, whether ICRC should, as a policy matter, so limit its own jurisdiction. We have serious doubts whether issue (a) can be answered in the affirmative. Notwithstanding, it is our view that as a policy matter, ICRC should not exempt CIA documents from its review.

(a) Legal issue. As expressed above, we have serious doubts whether ICRC can, under the existing Order, limit

its own jurisdiction to exclude review of a CIA denial of requests for declassification of CIA documents containing references to intelligence sources and methods. It appears that Executive Order 11652 was clearly intended to apply to CIA. Indeed, a representative of CIA is a standing member of ICRC. Section 7 of the Order establishes the charter of ICRC and provides that "(1) The Committee shall oversee Department actions to ensure compliance with the provisions of this order and implementing directives . . . [;and] (2) The Committee shall . . . consider and take action on suggestions and complaints from persons . . . and in consultation with the affected Department assure that appropriate action is taken on such suggestions and complaints."

It can be argued that exempting CIA documents containing references to intelligence sources and methods from ICRC jurisdiction would preclude ICRC from carrying out fully its responsibilities expressly assigned in the Order because the Committee would then be unable to monitor the implementation of the Order by CIA, an agency that is responsible for classifying a large amount of documents.

The Interagency Classification Review Committee is authorized to establish its own procedures. However, in our view, a provision exempting CIA documents from the jurisdiction of ICRC is more substantive than procedural. It would significantly alter the charter of ICRC. Accordingly, although the matter is not entirely free from doubt, we believe that Executive Order 11652 vests the responsibility for reviewing the propriety of the classification of all government documents in the Interagency Classification Review Committee -- with the exception noted below -- and that any decision to exempt CIA documents from ICRC jurisdiction would require an amendment by the President of Executive Order 11652.

Parenthetically, we should point out that the Central Intelligence Agency attempts to analogize its position to that of the Atomic Energy Commission. ICRC has agreed to include in its procedures language denying jurisdiction "of appeals involving information classified by the Atomic

Energy Act of 1954." However, AEC responsibility for protecting such information is not made expressly subject to NSC direction as is the responsibility of the Director of CIA for protecting intelligence sources and methods. Apparently, this fact is reflected in Section 8 of E.O. 11652 which provides that the Order shall not "supersede any requirements made by or under the Atomic Energy Act 'Restricted Data' shall be handled . . . and declassified in conformity with the provisions of the Atomic Energy Act" There is no similar provision denying ICRC jurisdiction over CIA documents in the Executive Order.

(b) Policy issue. The Central Intelligence Agency intends to argue that the Interagency Classification Review Committee should not, as a policy matter, assert jurisdiction over CIA documents involving references to intelligence sources and methods, whether or not an amendment of the Executive Order to such an effect is necessary. Basically CIA argues that "[a]uthority in an outside body to review and overrule decisions of intelligence officials to protect intelligence sources and methods is inconsistent and incompatible with the concept of the intelligence function." CIA Memo., p. 5. Further, Mr. Helms in a letter to Mr. Ehrlichman of January 29, 1973, argued that "any indication that an intelligence agency can be forced to reveal its sources and methods to outside review seriously reduces the confidence of those current and future sources and liaison relationships that are essential to the intelligence function."

We are unpersuaded by these arguments. Each member of the Committee has a top secret clearance, is a high-level official within the government and is assisting the National Security Council in monitoring the Order. At its lowest common denominator, the argument questions the judgment of the members of ICRC in these matters. We believe that this fear is ill-founded. It is our view that the Interagency Classification Review Committee should have jurisdiction

to determine whether all classified documents, other than those originated by the Atomic Energy Commission, should be declassified.

Robert G. Dixon, Jr.
Assistant Attorney General
Office of Legal Counsel